



Appellant alleged that his employment aggravated his degenerative joint disease. He first became aware of his knee condition on April 4, 2001 and first attributed the condition to his employment on that date. On the reverse of the form, appellant's supervisor noted that appellant had retired in July 2002.

The employing establishment submitted a copy of appellant's position description which included "moderate to arduous physical exertion" in the form of climbing ladders, occupying cramped crowded spaces for extended periods, physical force in arrests, search, pursuit and restraint of persons and the capacity to perform vigorous physical activities on a sustained basis.

The Office requested additional factual and medical evidence in support of appellant's claim in a letter dated May 5, 2004. It allowed appellant 30 days for a response. Appellant responded on May 19, 2004 and described his prior knee injuries. He underwent a medial and lateral arthrotomy of the right knee in 1972 due to a college baseball injury, a lateral arthrotomy of the left knee in 1977 follow a family football game and a second left knee surgery on February 16, 2001 due to increased symptoms with no specific cause. Appellant stated that he worked as a postal inspector for over 28 years and that his job duties included getting in and out of vehicles, climbing ladders, crouching or standing in tight spaces for long periods of time, using physical force to effectuate arrests and pursuit and restraint of suspects while on foot, including running climbing and jumping. He stated that he performed at least some of these activities on a daily basis as well as standing for much of the day.

The Office denied appellant's claim on June 21, 2004 on the grounds that he failed to submit sufficient medical evidence to meet his burden of proof. Appellant requested a review of the written record and submitted a report dated September 21, 2004 from Dr. Richard I. Zamarin, a Board-certified orthopedic surgeon, who reported that appellant described his position as requiring climbing ladders for 25 percent of the time, standing or walking for 25 percent of his time and sitting at a desk for 50 percent of his time. He denied work-related trauma to his knees. Dr. Zamarin stated that appellant's nonemployment-related surgeries rendered patients susceptible to premature osteoarthritis because of the amount of cartilage that was removed. He stated, "Any activity that would further stress [appellant's] knees would permanently aggravate and hasten the degenerative process of subsequent symptomatology and need for treatment." Dr. Zamarin opined that the employment activities described by appellant were sufficient to aggravate and hasten the degenerative process in appellant's knees. He concluded, "I therefore feel, based upon a reasonable degree of medical certainty, that there is a causal relationship between these occupational factors and the ongoing degenerative changes in his knees. Therefore, [appellant's] employment has contributed to his medical condition."

By decision dated November 10, 2004, the hearing representative set aside the Office's June 21, 2004 decision and remanded the case for referral of appellant for a second opinion evaluation. In a report dated March 29, 2005, the second opinion physician, Dr. Kevin F. Hanley, a Board-certified orthopedic surgeon, noted examining appellant and reviewing the statement of accepted facts. He diagnosed early degenerative disease of both knees greater on the right. Dr. Hanley stated that degenerative disease was a "natural recurring disease of life." He found that appellant's work exposure was not "over what would be considered a threshold for the injurious exposure." Dr. Hanley concluded that there was no relationship between appellant's work and the development of his low grade degenerative knee disease.

Based on Dr. Hanley's report, the Office denied appellant's claim on April 4, 2005. Appellant requested a review of the written record on April 11, 2005. By decision dated December 21, 2005, the hearing representative found a conflict of medical opinion between Drs. Hanley and Zamarin and remanded the case for referral to an impartial medical examiner.

The Office referred appellant, a statement of accepted facts and a list of specific questions to Dr. David A. Bundens, a Board-certified orthopedic surgeon, for an impartial medical examination. Appellant and his attorney alleged that the statement of accepted facts was not accurate. In his March 9, 2006 report, Dr. Bundens reviewed the medical evidence of record, listed his findings on physical examination and diagnosed bilateral osteoarthritis. He stated that appellant's condition was not work related. Dr. Bundens concluded, "The stresses at work, in my opinion are not duly physically stressful when we consider the normal stresses in the general population; and for this reason I do not consider them something that would exacerbate a condition beyond what normal activities would, *i.e.*, I do not think the job was that physically stressful that we can say that it would have accelerated his condition compared to the average U.S. citizen."

The Office denied appellant's claim by decision dated October 30, 2006. Appellant requested a review of the written record on October 29, 2006. His attorney alleged that Dr. Bundens had utilized an incorrect standard under the Federal Employees' Compensation Act in evaluating appellant's claim. In a decision dated January 8, 2007, the hearing representative set aside the Office's October 30, 2006 decision finding that the statement of accepted facts was inaccurate and that Dr. Bundens' report was not therefore entitled to special weight. She directed the Office to amend the statement of accepted facts to include appellant's official position description and to refer him to a second impartial medical examiner to resolve the conflict of medical opinion evidence.

The Office revised the statement of accepted facts to include appellant's official position description. It also provided a list of specific questions and defined causal relationship in accordance with the Act. The Office referred appellant to Dr. Ronald Gerson, a Board-certified orthopedic surgeon, for an impartial medical examination. In a report dated June 12, 2007, Dr. Gerson noted appellant's medical history and listed his findings on physical examination. He diagnosed bilateral osteoarthritis of both knees. Dr. Gerson stated, "There was no documentation upon review of the provided medical records that throughout his career as a U.S. Postal Inspector that the degenerative conditions in either of his knees were in any way aggravated or accelerated by his required job duties...."

By decision dated June 15, 2007, the Office denied appellant's claim based on Dr. Gerson's report. Appellant, through his attorney, requested a review of the written record on June 20, 2007. In a decision dated August 13, 2007, the hearing representative set aside the Office's June 15, 2007 decision and remanded the claim for the Office to request a supplemental report from Dr. Gerson explaining whether or not he believed that appellant's federal work activities contributed to his bilateral knee conditions.

The Office requested a supplemental report on August 15, 2007 and asked that Dr. Gerson "provide [his] specific medical opinion as to whether or not [appellant's] federal work activities contributed to his preexisting bilateral knee condition." It requested medical

rationale and objective findings in support of Dr. Gerson's conclusions. Dr. Gerson responded on August 20, 2007 and stated that appellant's knee osteoarthritis was not work related. He opined that appellant's employment duties "were not physically stressful beyond that which would be noted in the general population." Dr. Gerson concluded, "Therefore, I do not feel that any of the required job duties as a U.S. postal inspector would have resulted in osteoarthritis of the knees or aggravation of an osteoarthritic condition that would have been preexisting."

In a decision dated August 30, 2007, the Office denied appellant's claim finding that Dr. Gerson's report was entitled to the weight of the medical opinion evidence and established that his bilateral knee osteoarthritis was neither caused or aggravated by his employment duties. Appellant, through his attorney, requested a review of the written record on September 25, 2007. He argued that Dr. Gerson's report lacked the necessary medical reasoning and as the statement of accepted facts did not contain an accurate description of appellant's employment activities.

By decision dated January 18, 2008, the hearing representative found that Dr. Gerson's reports were entitled to the weight of the medical opinion evidence. She found that Dr. Gerson offered an opinion that appellant's knee conditions were not due to his employment and supported that opinion by stating that his employment activities were not sufficiently physically stressful beyond that noted in the general population.

### **LEGAL PRECEDENT**

To establish that an injury was sustained in the performance of duty in an occupational disease claim, a claimant must submit the following: (1) medical evidence establishing the presence or existence of a disease or condition for which compensation is claimed; (2) a factual statement identifying the employment factors alleged to have caused or contributed to the presence or occurrence of the disease or condition; and (3) medical evidence establishing that the diagnosed condition is causally related to the employment factors identified by the claimant. The medical opinion must be one of reasonable medical certainty and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant.<sup>1</sup>

With respect to an employment-related aggravation, an aggravation may be temporary or permanent. It is not necessary that a work factor materially contribute to a disabling condition; an employment-related aggravation is compensable regardless of the precise quantum of such aggravation directly attributable to work.<sup>2</sup>

The Act provides that if there is a disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination.<sup>3</sup> The implementing regulation states that if a conflict exists between the medical opinion of the employee's physician and the medical opinion

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<sup>1</sup> *Solomon Polen*, 51 ECAB 341, 343-44 (2000).

<sup>2</sup> *Arnold Gustafson*, 41 ECAB 131, 134 (1989); quoting *Henry Klaus*, 9 ECAB 333 (1957); *Wayne H. Brehmer*, Docket No. 05-1434 (issued December 12, 2005).

<sup>3</sup> 5 U.S.C. §§ 8101-8193, 8123.

of either a second opinion physician of an Office medical adviser or consultant, the Office shall appoint a third physician to make an examination. This is called a referee examination and the Office will select a physician who is qualified in the appropriate specialty and who has had no prior connection with the case.<sup>4</sup>

It is well established that, when a case is referred to an impartial medical specialist for the purpose of resolving a conflict, the opinion of such specialist, if sufficiently well rationalized and based on proper factual and medical background must be given special weight.<sup>5</sup> When the impartial specialist is unable to clarify or elaborate on his original report or if his supplemental report is also vague, speculative or lacking in rationale, the Office must submit the case record and a detailed statement of accepted facts to a second impartial specialist for the purpose of obtaining his rationalized medical opinion on the issue.<sup>6</sup>

### ANALYSIS

The Office properly found that there was a conflict of medical opinion evidence between appellant's physician, Dr. Zamarin, a Board-certified orthopedic surgeon and the second opinion physician, Dr. Hanley, a Board-certified orthopedic surgeon, on the issue of whether his accepted employment duties caused or aggravated his knee osteoarthritis. As there was an unresolved conflict of medical opinion evidence, the Office properly referred appellant's claim to an impartial medical adviser, Dr. Bundens, a Board-certified orthopedic surgeon, to resolve the conflict. As noted by the hearing representative in the January 8, 2007 decision, Dr. Bundens was not provided with an accurate statement of accepted facts and his report cannot constitute the weight of the medical opinion evidence.

The second impartial specialist, Dr. Gerson, a Board-certified orthopedic surgeon, failed to provide any medical reasoning supporting his conclusions in his initial report dated June 12, 2007. As found by the hearing representative on August 13, 2007, Dr. Gerson did not provide a clear statement that it was his opinion that appellant's employment duties did not cause or contribute to his diagnosed condition and also failed to supply the necessary medical reasoning in support of his statement that the medical records did not support aggravation or acceleration of appellant's knee conditions. In Dr. Gerson's supplemental report dated August 20, 2007, he indicated that there was some possible effect on the condition from appellant's employment duties, but that this was "not physically stressful beyond that which would be noted in the general population." This statement is not dispositive on the compensation issue presented. The question is whether there was any aggravation of the underlying degenerative condition with some contribution by work factors. The degree of aggravation is not the proper consideration in determining compensation under the Act. If there was any aggravation, then the physician must opine with medical reasoning whether the aggravation was temporary or permanent and if temporary what was the duration of the temporary aggravation.<sup>7</sup>

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<sup>4</sup> 20 C.F.R. § 10.321.

<sup>5</sup> *Gloria J. Godfrey*, 52 ECAB 486, 489 (2001).

<sup>6</sup> *Raymond A. Fondots*, 53 ECAB 637, 641 (2002).

<sup>7</sup> *Wayne H. Brehmer*, *supra* note 2.

Dr. Gerson does not clearly resolve these issues. On remand, the Office must secure a well-rationalized opinion from a new impartial medical examiner to resolve the issue of causal relationship between appellant's employment duties and his diagnosed osteoarthritis. After such further development as the Office deems necessary, it should issue an appropriate decision.

**CONCLUSION**

The Board finds that, the impartial medical examiner, Dr. Gerson, did not resolve all the issues presented and the case requires further development.

**ORDER**

**IT IS HEREBY ORDERED THAT** the January 18, 2008 decision of the Office of Workers' Compensation Programs is set aside and remanded for further development consistent with this opinion of the Board.

Issued: October 7, 2008  
Washington, DC

Alec J. Koromilas, Chief Judge  
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge  
Employees' Compensation Appeals Board